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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 212.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES P. STILES, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ALABAMA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

In view of the importance of the jurisdictional questions presented by the record in this case, arising out of the attempt by the State of Alabama to condition the continued existence of plaintiff in error as a consolidated corporation within that State on the payment of a tax upon or measured by capital stock of the consolidated corporation which was never, at any time, actually, potentially or constructively within the tax jurisdiction of that State, and in view of the

possibility that this argument may not be presented orally because of the crowded condition of the docket, counsel for plaintiff in error submit the following supplemental statement of their views in the premises:

Direct Burden on Commerce.

Irrespective of any other question in this case, the tax must be held unconstitutional under the authority of

Leloup vs. Mobile, 127 U. S., 640.
Allen vs. Pullman Co., 191 U. S., 171, 179.
Williams vs. Talladega, 226 U. S., 404, 419.
I. C. R. R. vs. Miss. R. R. Comm., 229 Fed., 248 (255).

Section 12 of the Revenue Act of 1911, unlike Code of 1907, sec. 2361, in mandatory terms imposes the tax complained of on *"all* corporations organized under the laws of this State," absolutely and unconditionally, and the parallel tax on *"all* corporations organized under the laws of any other State, nation or Territory and doing business in this State." Interstate commerce is not excepted, as is done in the case of telegraph companies, etc., by sections 1 and 2 of the same act, or, as was done by the act of March 7, 1907 (Code, 1907), held unconstitutional in *Southern Railway Co. vs. Greene.* Sections 229 and 232 of the Constitution are also without exceptions as to such commerce. If section 229 of the Constitution and the first clause of sec. 12 of the act of 1911 apply to plaintiff in error, there results a tax on the privilege of engaging in such commerce. It is not enough to say that plaintiff, as a domestic corporation, may be taxed for the privilege of exercising its corporate functions, for the reason that, under the view announced by the Supreme Court of Alabama, plaintiff in error is, for all purposes in Alabama, a corporation organized under the laws of Alabama and subject to this tax, which may be enforced by lien and attachment (Code of 1907, section 2363) and by

criminal prosecution. Acts 1911, sec. 33 G, p. 184; *Phœnix Carpet Co. vs. State,* 118 Ala., 143. Hence, plaintiff in error could not, as a corporation of Mississippi or Tennessee, engage in strictly interstate commerce without being seized and taxed on such commerce under the construction of the Alabama Supreme Court. Indeed, under the authorities nothing can be said for the tax, even as to foreign corporations. This act was adopted before the decision in *Williams vs. Talladega, supra;* but none of the fundamental questions presented by this record are moot questions as to the future, since substantially the same discrimination has been perpetuated by the legislature of 1915.

Statute Altogether Ambiguous.

Section 12 of the act referred to (1911, p. 170) taxes "all corporations organized under the laws of this State" and "all corporations organized under the laws of any other State, nation or territory," etc. The Supreme Court says (Printed Record pp. 30, 31). The act embraces " 'all corporations organized under the laws of this State.' Plaintiff is such a corporation—none the less so *because organized also under the laws of two other* States. We ask, then, if such be the case, upon what theory can the court assert that plaintiff in error should be taxed under the domestic tax clause rather than under the foreign corporation clause if, as there held, plaintiff in error is also conceded to be "organized under the laws of two other States." It would seem, at least, that the statute is sufficiently in equipoise to have justified the court in exercising some regard for inter-state comity—aside from the grave challenge to the Constitution worked by the application of the more onerous tax to plaintiff in error.

The statute, involving as it does, severe penalties for the transaction of business without paying the franchise tax exacted according to its terms, seems clearly too indefinite to furnish any standard for compliance and should be de-

nounced as to plaintiff in error on that ground. Indeed, the conclusion of the court below is that the Revenue Act is free from constitutional objection, whereas the question for determination is whether the act is applicable at all to plaintiff in error and if so whether the more onerous clause may be applied without justly incurring the constitutional objections herein stated.

"Capital Stock" and "Capital."

The foregoing terms as used in the Constitution with reference to the assessment of franchise taxes on corporations—and in the revenue act of 1911—do not mean shares of stock, but the whole property of the corporation wheresoever situated and in whatever form invested.

1 Cooley on Taxation (3d ed.), p. 688.
People vs. Morgan, 178 N. Y., 433.
Note, 58 L. R. A., 514.

References in the brief of plaintiff in error and in the brief of defendant in error heretofore filed to "capital stock" or "stock" as being "issued," as if the phrases under discussion had reference to shares of stock, are inadvertently used. The tax purports to be upon the privilege of exercising *all* corporate franchises in terms of the property of the corporation in Alabama and elsewhere. There is no limitation of the tax to the franchises granted by Alabama, nor any effort to segregate the interstate functions performed within Alabama pursuant to the right of plaintiff in error as an interstate corporation of Mississippi and Tennessee, admitted into Alabama by the consolidation.

Nature of Tax Complained of.

The tax involved in this proceeding was considered by the Supreme Court of Alabama in *K. C., M. & B. R. Co. vs. Stiles,* 182 Ala., 138; 62 South., 734, and in *Southern Railway Co. vs. Greene,* 160 Ala., 396; 49 South., 404, and was declared to be—

> "primarily a license tax *for the continued exercise of their corporate franchises.* * * * The payment of such a tax is one of the conditions imposed by the sovereign power upon its own creatures, in consideration of the boon of corporate life *and the enjoyment of corporate functions and powers*" (Printed Record, p. 31).

It was also said (*loc. cit.*) that the tax thus exacted of domestic corporations by the revenue act in question, which requires that all corporations organized under the laws of Alabama shall pay annually a franchise tax (main Brief, p. 61), was enacted to execute the mandate of sec. 229 of the Constitution of Alabama (1901), requiring that—

> "the legislature shall, by general law, provide for the payment to the State of Alabama of a *franchise* tax by corporations organized under the laws of this State, which shall be in proportion to the amount of capital stock."

A similar "franchise tax" was required by section 232 of the Constitution of Alabama (1901) to be levied on all foreign corporations which shall do business in Alabama "based on the actual amount of capital employed in this State" (main Brief, p. 11). The franchise tax reviewed in *Southern Railway Co. vs. Greene* and levied against foreign corporations was against "every foreign corporation authorized to do business in this State under the laws of Alabama," and did not apply to acts or contracts constituting interstate commerce (acts 1907, p. 364, sec. G).

It was earnestly sought by counsel for the State in the *Greene case* to induce this court to hold that the franchise tax against domestic corporations was sufficiently different, in respect of the subject taxed, from the franchise tax required of foreign corporations to justify classification and taxation on a different rate or basis. Thus in the brief for the State on that appeal, page 29, we find the following:

> "We earnestly contend that the Alabama tax is imposed on foreign corporations for and on account of the privilege granted to such corporations to exercise in the State corporate powers and functions granted and controlled by another State, or the privilege of exercising their corporate franchises or for carrying on their corporate business in such corporate or organized capacity in this State; and that the tax upon domestic corporations is imposed for the privilege or right to be a corporation."

The decision of this court established the principle that the right or privilege "to be a corporation" and the right or privilege of "exercising their corporate franchises or for carrying on their corporate business in such corporate or organized capacity" were not rights existing merely *in nubibus*, and that when the business done pursuant to such franchise is identically the same in each case, it would be "a fanciful distinction to say that there is any real difference" or any just basis for classification.

That case is necessarily decisive here on the principle of discrimination. The same result must be arrived at on equally fundamental grounds.

The Franchise Taxed.

As established in the *Greene case* and as a matter of common sense, a franchise granted by a State to be a corporation and to exercise corporate franchises is not a mere right *in nubibus*. It is a license to do something, involving, as said by the Supreme Court of Alabama, *supra*, "the *enjoy-*

ment of corporate functions and powers." It is clear that these terms imply an objective of some kind and reference must be had to the terms of the franchise itself to see what is granted by the State. It must grant a property right that *implies* value and use. If not, it could not be taxed.

The powers and privileges vested and to be exercised by a corporate body as such are the franchises of the corporation.

> "It is insisted that the tax on the franchise is something entirely distinct from the property of the corporation and that the legislature was not inhibited from taxing it.
>
> "This position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running and taking fare and freight—is property, and of the most valuable kind."
>
> *Gulf & S. I. R. R. Co. vs. Reid,* 18 Wall., 264.

It was conclusively and finally pointed out in *Memphis, etc., R. Co. vs. Berry,* 112 U. S., 609, 619, that the franchise to be a corporation belongs to the incorporators and is entirely distinct from the franchise of the corporation, which is composed of the *powers and privileges vested and to be exercised by the corporate body as such.* This distinction was recognized fully by the Supreme Court of Alabama in *South. Ry. Co. vs. Greene,* 160 Ala., at p. 405:

> * * * "the right to be a corporation is a right or franchise that belongs to the individuals who compose the corporation, and not to the corporation itself. The franchises of the corporation are the rights to engage in and carry on the business for which it was chartered."

In that case it was recognized that the decision in *Home Ins. Co. vs. New York,* 134 U. S., 594, 599, merely decided that the question at issue was whether or not the corporate franchise taxed in that case was identical with the tangible

property—the capital stock or property of the company—quoting Mr. Justice Field's observation that:

> "The tax is not a tax on the capital stock or property of the company, but upon its corporate franchise."

In *Shields vs. U. S.*, 95 U. S., 319, the court said:

> * * * "the franchise alone to be a corporation would have been unavailing for the purposes in view. * * * It was, therefore, indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation."

The franchise of plaintiff in error which is sought to be taxed on the basis complained of was and is the right to "enjoy the functions and powers" of a consolidated interstate railroad under specific conditions, wholly beyond the control of plaintiff in error to diminish or abandon. These organic conditions, which did not arise after the franchise was granted, but were and are the terms which determine and define the franchise, or thing taxed, included, *inter alia*, the following:

> (*a*) The ownership and operation of a going railroad in Alabama, devoted to the service of the public, inalienable, and subject to regulation by the State.
>
> (*b*) Similar railroads in Mississippi and Tennessee.
>
> (*c*) The corporate franchise so granted cannot be surrendered or abandoned by plaintiff in error without the consent of Alabama, as it was and is employed in public service. Plaintiff can get rid of it neither by sale nor by voluntary dissolution.
>
> (*d*) The act authorizing the consolidation required as a primary condition to consolidation that the consolidating lines be such as to admit of continuous system operation and the articles of consolidation which became crystallized in the franchise now taxed show that the franchise was to operate that system as a consolidated railroad system with important rights

vested in and reserved to other States: more than half of the railroads owned and capital employed being outside of Alabama, and beyond any power of plaintiff in error to sell and thereafter reinvest or otherwise employ in Alabama.

TAXES RIGHTS HELD IN OTHER STATES.

We contend, first of all, that in trying to tax plaintiff in error as a strictly domestic corporation the State is not taxing merely the use of the "franchise" actually granted, but something which it has not granted. It is taxing plaintiff in error as if it had granted plaintiff in error a charter to organize in Alabama with $5,976,000 of capital and employ that capital in acquiring railroads in Alabama or elsewhere, or, at least, with some freedom to exercise or refrain from acting under the franchise. Here, on the contrary, the franchise took hold of a settled condition and a group of inflexible obligations which not only limited the freedom of action of plaintiff in error, but made it obligatory on the State of Alabama to see that the taxation and control of the consolidated company within its jurisdiction was not "done by discriminating against rights held in other States"—to use the words of caution employed in *Delaware Railroad Tax Case*, 18 Wall., 206, in which a franchise tax, based on capital stock *apportioned according to mileage*, was sustained. And see early words of caution in the case of *R. R. Co. vs. Jackson*, 7 Wall., 262.

For Alabama to tax plaintiff in error on the theory that the franchise granted was an original franchise conferring the privilege and option, to be availed of or not as plaintiff in error saw fit, to invest in Alabama or elsewhere or to hold under the protection of Alabama capital then invested in the Mississippi and Tennessee properties, and that the capital was thereupon invested pursuant to that franchise, is to tax plaintiff in error on a hypothetical franchise that never existed and, therefore, to take its property without due process.

A franchise or license implies the grant of a privilege to do something which the grantee may or may not do at his option. It implies, in any event, some sort of *locus pœnitentiæ*. Otherwise it becomes a statutory duty and ought to be rewarded and not taxed. It is clear that there was never an interval of a moment between the grant of the "franchise" to the consolidated company when the latter had any option whatever as to its main functions or as to the *situs* or employment of its capital. That part then and now in Mississippi and Tennessee was never actually, potentially or constructively in Alabama or under its protection or subject to its taxing power. Nor was its employment in those States accomplished or continued in any constitutional sense with the consent of Alabama. And yet privilege and franchise taxes rest "upon the assumption that what is done depends upon the State's consent."

Provident Savings Ass'n vs. Kentucky, 239 U. S., 103.
Louisville and J. Ferry Co. vs. Kentucky, 188 U. S., 385.
California vs. Central Pac. R. Co., 127 U. S., 1.

And some measure of freedom to accept or decline seems necessary to support a tax on a franchise or privilege as well as a classification of franchise owners for taxation.

Cornell Steamboat Co. vs. Sohmer, 235 U. S., 549.
Flint vs. Stone Tracy Co., 220 U. S., 107, 151, 152.
Abilene, etc., Bank vs. Dolley, 228 U. S., 1.
I. C. R. R. Co. vs. Miss. R. R. Comm., 229 Fed., 248 (255).

It is incontestable that prior to the consolidation the Alabama constituent of plaintiff in error had acquired and held and was taxable on a franchise in the ordinary sense of the term and was a strictly domestic corporation; that this corporation and its capital were subject to the jurisdiction of Alabama in all constitutional ways, and that the State may now by proper legislation exercise the same rights of sov-

ereignty in the premises that it could have exercised had the consolidation not taken place, including the levy of a proper franchise tax.

State Acquired No Foreign Jurisdiction.

What we do contend is that by consenting to the consolidation it did not draw jurisdiction over property and rights whose *situs* was irrevocably fixed in Mississippi and Tennessee, and that it cannot tax plaintiff in error as if it had granted an original and unconditional franchise under which plaintiff in error might be said to have acquired and invested capital in Mississippi and Tennessee.

The contention of the State that plaintiff in error is, for the purposes of franchise taxation, a strictly domestic corporation and that its entire capital stock came into existence as the result of constitutional or efficient action by the State of Alabama or is taxable by Alabama *without classification or apportionment*, on a franchise basis is based on indefensible theories.

Pacific Removal Cases, 115 U. S., 1.
California vs. Central Pac. Ry. Co., 127 U. S., 1.
Louisville & J. Ferry Co. vs. Kentucky, 188 U. S., 385.

It cannot be said that this tax is levied only against the use of that franchise effectively granted by Alabama, for the Supreme Court of Alabama has construed the act as allocating to Alabama the entire capital stock of the corporation, and as taxing its corporate franchises, *en bloc*, which, of course, represents the entire corporate organism and necessarily excludes any recognition of the rights of plaintiff in error which depend exclusively on the sovereign action of Mississippi and Tennessee as well as any acknowledgment of their plenary jurisdiction over the capital stock, property, and assets whose permanent *situs* in those States

was a term and condition of the franchise. It is incontestable that plaintiff in error did not acquire and does not hold or employ the capital stock represented by the Mississippi or Tennessee company as a result of the Alabama "franchise" or as an Alabama corporation, since the devolution of those properties and their subsequent use and enjoyment is dependent on the exclusive jurisdiction of the States mentioned (Main Brief, Proposition V, p. 17; also pp. 34, 35).

L. & N. R. Co. *vs.* Kentucky, 161 U. S., 677.
Branch *vs.* Jesup, 106 U. S, 478.

There was no *interregnum* as to any of these properities or franchises. They were never properties at large. As employed in the public service, they were static in those States, removed from theoretical sale and removal to Alabama or reinvestment in Alabama in such wise as to come under its jurisdiction or protection. There was never any surrender or abandonment by Mississippi or Tennessee of their exclusive jurisdiction in the premises, and the consolidation became effective subject to that underlying condition. It is accordingly clear that the capital and capital stock of the consolidated company representing or represented by the Mississippi and Tennessee properties was never at any time subject to the actual, potential or constructive control of Alabama in the sense that its use was ever validly authorized by or dependent upon or responsive to the Alabama franchise or could be.

For this reason, and without reference to the effect of using this Mississippi-Tennessee property to measure an Alabama tax, it is clear that the Supreme Court of Alabama interprets the franchise, capital and capital stock consolidated by the action of the three States, *in solido*. This construction effectually and definitely arrays the statute against the due-process clause of the Fourteenth Amendment.

That a State cannot take advantage of conditions imposed in connection with a grant of privileges within its constitutional power to extend those same conditions to the exercise

of similar privileges beyond the jurisdiction of the State is forcibly stated in *New York Life Insurance Co. vs. Head*, 234 U. S., 149, where the court said, in answering a contention of the State of Missouri, to the effect that:

> "* * * because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority, a distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States. It is apparent, therefore, that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephemeral and depend simply upon the willingness of any of the States to exact as a condition of a license granted to a foreign corporation to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing. * * * The Constitution and its limitations are the safeguards of all the States, preventing any and all of them under the guise of license or otherwise from exercising powers not possessed."

These observations are directly applicable to the attempt of Alabama in the case at bar.

Situs for Taxation.

The question as to *situs* for the purpose of taxation has been the occasion for recent consideration by this court in every salient particular involved in this matter.

United States vs. Goelet, 232 U. S., 293, was a case involving the contention that "due process" was violated by section 37 of the Tariff Act of 1909, which imposed an excise tax on the use of a foreign-built yacht owned by any citizen

of the United States, in that the tax could not be constitutionally applied to a person who, although a citizen, was a resident and permanently domiciled in a foreign country and had not used the yacht in American waters.

The court, after asserting that the protection and world-wide jurisdiction of the United States over its citizens was of the essence of national sovereignty, said:

> "The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and, therefore, it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of one ends the authority of the other begins.
>
> "* * * the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States. * * *"

The power of taxation undoubtedly rests upon a grant or privilege accorded by a State within its constitutional power—*Provident Savings Ass'n vs. Kentucky*, 239 U. S., 103—or else upon governmental protection in some degree. Although the extent of the tax is not necessarily in proportion to benefits, jurisdiction to tax and political or governmental protection must coincide.

Union Transit Co. vs. Kentucky, 199 U. S., 194.
Pullman's Palace Car Co. vs. Penn., 141 U. S., 18.
N. Y. Cent., etc., R. R. Co. vs. Miller, 202 U. S., 584.

As Mississippi and Tennessee have, without interregnum, held plenary and exclusive jurisdiction over the only valid franchise or privilege under which plaintiff in error acquired, employed, and now holds its property and capital located in those States, respectively, it is impossible to understand the basis for the assertion in this case that when the State of Alabama gave its approval to the consolidation of existing railroad systems in Tennessee and Mississippi,

with a connecting line in Alabama, it thereby granted an effective license to the consoli[illegible]ed company to acquire, invest, and employ the prope[illegible] and capital in the sister States in any such sense as to permit Alabama to reach and tax as it does, *in solido*, the corporate franchises of plaintiff in error, without any exception that would permit plaintiff in error to engage in interstate commerce as a corporation of Mississippi or Tennessee except on payment of the tax.

The futility of any action by Alabama with reference to the status, property, and capital of the Mississippi and Tennessee companies is sufficiently demonstrated by the authorities cited and quoted in our former brief. Proposition II, p. 16; also pp. 23-33.

The question whether personal property of a resident of one State situate in another State can nevertheless be taxed in the State of the owner's domicile was left undecided in *St. Louis vs. Ferry Co.*, 11 Wall., 423, 430, and decided adversely to the State of domicile in *Union Transit Co. vs. Kentucky*, 199 U. S., 194, and while there may be left open to doubt the question of concurrent taxation by the several States of property in motion or returning from time to time, such as railroad cars (*N. Y. Cent., etc., R. R. Co. vs. Miller*, 202 U. S., 584, 597, and dissenting opinion of Mr. Justice Holmes in *Pullman Co. vs. Kansas*, 216 U. S., 75), every contention which could be asserted in support of any possible jurisdiction in the State of Alabama over the property and capital of the plaintiff in error located in Tennessee and Mississippi or over any franchise to operate in those States or in interstate commerce as a corporation created by those States or any right to regulate or tax that property or those franchises has been conclusively repudiated in the following cases:

Louisville & J. Ferry Co. vs. Kentucky, 188 U. S., 385.

California vs. Central Pac. R. Co., 127 U. S., 1.

Del., Lack. & W. R. Co. vs. Pennsylvania, 198 U. S., 341.

Union Transit Co. vs. Kentucky, 199 U. S., 194.
Seliger vs. Kentucky, 213 U. S., 200.
Fargo vs. Hart, 193 U. S., 490.
W. U. T. Co. vs. Kansas, 216 U. S., 1.
Wheeler vs. Sohmer, 233 U. S., 434.

We have no attack to make on the right of the State of Alabama to impose property taxes on this railroad on a system basis, apportioning to Alabama her proper proportion by some reasonable method. That system of taxation was employed for each year involved in this matter and plaintiff in error paid its full assessment of *ad valorem* property taxes, including the franchise and intangible value of the entire property in Alabama. The tax here involved is in addition to the *ad valorem* property taxes and cannot, of course, be justified on the theory of *Maine vs. Grand Trunk Central*, 142 U. S., 217, as finally interpreted and harmonized by Mr. Justice Holmes in *Galveston, Harrisburg, etc., R. R. Co. vs. Texas*, 210 U. S., 217, and in *U. S. Express Co. vs. Minnesota*, 223 U. S., 335.

Oklahoma vs. Wells-Fargo, 223 U. S., 298, 301.
Flint vs. Stone-Tracy Co., 220 U. S., 162, 165.

No Case Supports This Tax.

We have been able to find no case in which it has been adjudicated that a State could tax the franchise of a consolidated interstate corporation by a tax on or measured by its capital stock *in solido*, except on some basis of apportionment according to mileage or receipts, such as *Delaware Railroad Tax Case*, 18 Wall., 206; *Easton, &c., Bridge Co. vs. Metz*, 32 N. J. L., 199, which was, however, not a consolidated corporation, but a corporation which received a separate statutory charter from two States, etc.

Defendant in error asserts in brief (p. 22) that *Keokuk, etc., Bridge Co. vs. People*, 161 Ill., 132, *held* that "the total capital stock of a consolidated company formed in Illinois

was properly taxable there." This is clearly inadvertent. The Illinois court is firmly committed to the doctrine of apportionment. Thus, in *Ohio, etc., Co. vs. Weber,* 96 Ill., 443, following an earlier case to the same effect, it was said (italics ours):

> "The capital stock, *located or used in this State,* of such corporation is subject to be assessed and taxed" (96 Ill., 446).

In that case the proper limits of State sovereignty for which we contend were fully recognized by the court, which defined the term "capital stock" as meaning all of the property and rights of the corporation of every kind and nature wherever located (p. 448), and then said:

> "The mode of finding the value of the capital stock to be taxed in Illinois was to take the value of the entire capital stock of this corporation and adopting that amount thereof which should bear to the value of the entire capital stock the same proportion as the length of that part of the line lying in Illinois bears to the entire length of the whole line of railroad owned and operated by this corporation."

This case was approved in the *Keokuk Bridge Case,* 161 Ill., 132, relied on by counsel for defendant in error, and reversed an assessment which failed to comply with the principle of apportionment above referred to. Answering, in that case, the contention of counsel for the Bridge Company that the total capital stock should not be considered, as it was not owned or subject to taxation in Illinois, the court asserted that, as a corporation having a domicile in Illinois, it is "liable to taxation upon all its property *which is of such a nature as to be taxable at the residence of the owner,*" concluding with the observation that "capital stock" did not mean shares, but "the property of the corporation subject to taxation as a homogeneous unit." This seems to mean nothing more than the thoroughly established principle of ascertaining values on a unit basis, which was duly observed

in that case. If it meant more it was a *dictum* which cannot for a moment be supported, for the court was there dealing with *ad valorem* taxes on property, and there is no possible defense for the suggestion that Illinois could declare that the whole property of the corporation, both local and foreign, should be taxed as "capital stock" at the Illinois domicile of the corporation.

In *Louisville & J. Ferry Co. vs. Kentucky*, 188 U. S., 385, 395, a strictly domestic corporation of the State of Kentucky, was chartered by Kentucky to build and operate a bridge over the Ohio River and was in its charter authorized to accept a franchise from the State of Indiana to that end. The value of this Indiana franchise was included in an assessment in Kentucky of the company's intangible values without allowance or apportionment. It was contended by counsel for Kentucky that the Indiana franchise was received and enjoyed by the ferry company pursuant to the Kentucky franchise and charter, which authorized its creature to accept and use it. The court said:

> "But the franchise obtained from Indiana is not in the company's charter granted by Kentucky. It is contained only in the act of the Legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. *Its existence and validity depend entirely upon the laws of Indiana.*"

Kentucky then insisted that, if the Indiana franchise was not responsive to the Kentucky charter in the sense contended, that nevertheless the whole capital and property of the Kentucky company might properly be used as a factor to determine the tax on the Kentucky franchise. Although the court saved the question, saying:

> "We express no opinion as to the validity of such a condition if it had been inserted in the company's charter or if it were now in terms prescribed by any statute,"

that suggestion was vigorously repudiated in *W. U. T. Co. vs. Kansas*, 216 U. S., at page 37, where the court suggested the case where a State should, as a condition to the transaction of intrastate business by a domestic corporation, impose upon it a condition that the corporation pay a given per cent of all fees or commissions received by it in its business, interstate and domestic, and said:

> *"There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce and therefore would be unconstitutional and void."*

The same conclusion must, of course, obtain if the condition is the payment of a tax measured by the value of property having a permanent *situs* beyond the jurisdiction of the State.

A similar question came on for decision in *N. Y. Cent. R. R. Co. vs. Miller*, 202 U. S., 584, where a so-called franchise tax was levied against a strictly domestic corporation by the State of New York, based on its *capital employed* in that State. It was contended that certain cars moving in and out of the State which were treated by the tax officials as having their *situs* within the State for the purpose of determining the amount of capital employed in New York, should be apportioned between New York and other States in which they were employed. Without expressly deciding that if the *situs* of these cars was not properly attributable to New York the tax would be invalid under the Fourteenth Amendment, *the opinion proceeded on that theory*, reaching the conclusion, however, that the *situs* of the cars for taxation was properly allocated to New York, the State of the owner's domicile. In the course of the opinion the court said, with reference to the tax:

> "It is called a franchise tax in the act, BUT IT IS A FRANCHISE TAX MEASURED BY PROPERTY. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, Lackawanna &*

Western R. R. vs. Pennsylvania, 198 U. S., 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case."

The case of *Delaware, Lackawanna, etc., R. R. Co.*, above referred to, involved a tax on a strictly domestic corporation in terms of its capital stock, and it was held that the tax was void to the extent that it embraced in the assessment the value of coal which had been shipped and had acquired a permanent *situs* outside the State.

Franchise Tax Cases.

These authorities, if not directly controlling, are in point, and the conclusion deducible from them is unavoidable, viz: that this tax on the franchise, based on a non-taxable factor, is beyond the legitimate jurisdiction of the State and invalid, without reference to the question of discrimination.

A review of the authorities generally relied on as sustaining the power to impose franchise taxes at will strengthens this conclusion.

In *Delaware Railroad Tax Case*, 18 Wall., 206, a case of an apportioned franchise tax, thus carefully avoiding the situation here presented, the court, after sustaining the jurisdiction of the State of Delaware to tax the franchise, on the ground that the consolidation *in no respect changed the position with reference to taxation of the new company in one of the States from the old company in such State*, found that the rule of measurement for apportioning the capital stock representing the line in Delaware was approximately just; and, having reached that conclusion, asserted the ancient principle of State taxation—that the manner and rate were matters of legislative discretion, however arbitrary or capricious, but concluding the opinion with the words of caution above quoted to the effect that a tax of this nature must not discriminate against rights held in other States.

These expressions, repeated in other cases such as *Home Ins. Co. vs. N. Y.*, mean no more than the assertion that

taxation, if directed against a subject-matter within the jurisdiction of the taxing power, may be arbitrary in the sense that the legislature is the sole judge as to the weight and burden of the tax. This by no means asserts the proposition that constitutional limitations upon methods of classification can be ignored or the power of the State extended. It merely means that the State is the final arbiter as to the amount and method of levying a constitutional tax. Where, however the legislature does not fix an arbitrary amount or levy the tax according to value or does not base the tax on a factor itself taxable within the jurisdiction, but, on the contrary, measures a proposed tax against a subject-matter apparently within the tax jurisdiction of the State by a nontaxable factor, the courts will always scrutinize the tax where the contention is asserted that it in effect taxes the measure rather than the apparent object or taxes property outside of the State, or violates the guarantee of equal protection.

Questions of this nature were considered, in arriving at the conclusion that the tax was valid, in the *Home Insurance case, Horn Silver Mining Case, Delaware Railroad Tax case, etc.*, and, particularly, in *New York State vs. Roberts*, 171 U. S., in which the court considered a tax against a foreign manufacturing corporation doing business in New York, which was required to pay a franchise tax on its capital there employed. Pointing out that since the *Horn case* the statute had been amended so as to measure the tax according to the capital employed in New York, and thus relieving the tax of the contention, overruled in the *Horn case* with weighty dissent dividing the court, that it had the effect of taxing property outside of New York, the court distinguished the case from those involving interstate corporations, clearly foreseeing the conclusion finally reached in *W. U. T. Co. vs. Kansas*, 216 U. S., 1:

> "It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business."

These general expressions have, of course, given way to an analysis of the tax in many cases in which the subject-matter purporting to be taxed was admittedly within the tax power of the State, the court reaching the conclusion that the effect of the tax was to reach a subject-matter beyond the State's power or was levied in violation of the constitution, notably in the line of cases following *W. U. T. Co. vs. Kansas, supra.*

Standard of Measurement Must Not be Wholly Arbitrary.

In determining whether or not the tax levied by some standard of measurement, as in the case at bar, is, indeed, a tax upon the subject-matter which it purports to tax, or is in fact upon the measure or standard for determining the tax or upon property outside the jurisdiction of the State, the conclusion is frequently determined by the inquiry whether the standard of measurement is so arbitrary as in effect to make the tax one upon the standard rather than the apparent objective of the tax. A common instance in which the levy of the tax by a standard not itself within the taxing power of the State is adverted to in *Bank Tax Case*, 2 Wall., 200, where the provision that national banks should be "liable to taxation on a valuation equal to the amount of capital stock paid in and their surplus earnings," was sought to be sustained on the theory that the tax was imposed upon the corporation and not its property, and that the statute only prescribed a measure of the amount to be paid for the franchise. But the court held that the tax was upon the capital.

In *Home Savings Bank vs. Des Moines*, 205 U. S., 503, 519, it was again sought to sustain a tax of this nature on the theory that a tax on the corporation, measured by the value of shares, is equivalent in its effect to a tax (clearly legal) upon the shareholders in respect of their shares. The court said:

> "But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and

> has not the power to levy the other. The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. * * * 'The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration.' "

A tax levied by the State of Alabama "on all steamboats, vessels, and other water-crafts plying in the navigable waters of the State, *at the rate of* one dollar per ton of the registered tonnage thereof," was sought to be sustained as a tax on property within the constitutional power of the State—

> "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties."

This contention was overruled and the tax held invalid as a duty on tonnage, and was not saved by reason of the fact that the *situs* of the boats and their business was wholly intrastate. *State Tonnage Tax Cases*, 12 Wall., 204, 216.

In *Seliger vs. Kentucky*, 213 U. S., 200, a tax was levied by the State of Kentucky on warehouse receipts held in Kentucky by a citizen of that State, but representing whiskey stored in Germany, the Court of Appeals of Kentucky directing judgment against the holder for taxes due upon the warehouse receipts at the agreed value "per barrel of whiskey embraced in them." This court said, "* * * it will be seen that the effect is the same as if the whiskey itself had been taxed" and, assuming that the whiskey was permanently located in Germany in such sense as to avoid the effect of *N. Y. Cent., &c., R. R. Co. vs. Miller*, 202 U. S., 584, 497, the tax was held invalid.

In Cooley on Taxation (3d Ed.), p. 676, *et seq.*, the discussion of taxes on franchises is prefaced by this remark:

"but such taxes are often measured by a standard which suggests the question whether in fact they are not taxes on property," and cites a large number of cases where the various "measures" employed were held to constitute taxes on the property or on the "measure" rather than taxes on the franchise (677, *et seq*).

It is not our contention that if a state levies a tax conceded, as applied in each particular instance of its levy, to be within its constitutional power, the courts may declare it invalid merely because irrationally levied or measured. What we do contend is that the courts will not construe a tax as a franchise tax if measured by property or by a subject-matter of taxation not only beyond the taxing power of the State but affording no rational or defensible basis as a measure of the alleged tax on a subject-matter which may be within a constitutional exercise of the tax power of the State.

In course of the opinion in *Flint vs. Stone Tracy Company*, and referring to the proper distinction which sustains a tax lawfully imposed upon the exercise of privileges within the taxing power of the State, although measured by the income of the corporation, derived, in part it may be, from non-taxable property, Mr. Justice Day said:

> "The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."

In the case cited (220 U. S., at p. 165) the court clearly acquiesces in the proposition that the measurement of the tax must not be on so arbitrary or baseless a standard as to fall outside the authority of the taxing power and proceeds to justify investments and assets as having a genuine relation to the subject matter of the tax which was: "the privileges which exist in conducting business with advantages which inhere in the corporate capacity of those taxed," wheresoever the privileges were exercised.

While the court in that case sustained the tax although

measured by the income from property not actually used in the business of the corporations taxed, it was unquestionably treated as potentially or constructively used or within the option or power of its owner to use it in the corporate business, as a basis of credit or otherwise, for the court quoted with approval the reasons on which an excise tax upon the liquor business was sustained, where based on the *capacity* of the plant, although such capacity was not actually utilized. The potential, possible, optional use of the privilege taxed was clearly in mind, quoting from *United States vs. Singer,* 12 Wall., 111,

> "Every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertakes to distil at all, he is not entitled to much consideration."

Nothing in that application of the principle detracts in any way from the argument that the valuation of a privilege or franchise in Alabama, based on the use somewhere else of a franchise granted by another State or on the use elsewhere of property which is permanently excluded from employment in Alabama is arbitrary and indefensible.

In the *Flint Case* the court was dealing with an excise tax levied upon the privilege which inheres in the transaction of business in a corporate capacity by any "person" within the jurisdiction of the United States. The court recognized the potential use of all of the capital of the corporations subject to the tax, in connection with their business, whether actually employed in the strictly corporate business or not. A clear distinction is seen when the question involved is the determination of values or subjects for taxation within the borders of a single state, as illustrated in *Fargo vs. Hart,* 193 U. S., 490.

In that case the State of Indiana sought to include securities and property located and taxable in New York, or outside of Indiana, in arriving at the tax value of the express

company property in Indiana on the unit basis. The State insisted that these factors should enter into the valuation because, if not used in the business, they at least gave the credit necessary for carrying the business on. The court repudiated this contention and demonstrated that if the use of this non-express capital could be considered as reflecting some value on the line in Indiana by way of good will or otherwise, it was so remote as not to furnish a proper standard for measurement:

> "Assume that something is to be added to the good will of a company because it is safe, and that the good will, or a part of it, of the express business in Indiana may be considered in assessing its property there, *this is very different from measuring the good will by the capital.* * * * The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the board was wrong. It involves an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States."

In *Equitable Life Ins. Co. vs. Penn.*, 235 U. S., 143, 147, this court, speaking through Mr. Justice Holmes, clearly recognized the propriety of challenging the measure of a privilege tax exacted, in that case, of a foreign insurance company which might have been excluded entirely. The tax was measured by the premiums paid the insurance company by residents of Pennsylvania. The court considered the question as properly involving the right of the State "to consider the benefit thus annually extended into Pennsylvania in measuring the privileges that it does grant," and said:

> "We may add that the State protects the company equally by protecting the lives insured, wherever the premiums are paid. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax * * *. As to that

a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania. * * *"

In all of the cases in which a factor which is, in itself, removed from direct taxation, has been used by the State as a measure to ascertain a valid tax on property or franchises, the exempt factor was shown to have a direct or logical bearing on the value of the subject-matter proposed to be taxed.

Thus in *Maine vs. Grand Trunk Ry. Co.*, 142 U. S., 217, as interpreted in *Galveston, Harrisburg, &c., Ry. Co. vs. Texas*, 210 U. S., 217, and in *U. S. Express Co. vs. Minnesota*, 223 U. S., 335, where the annual privilege tax required of every railroad operating within the State was determined upon a proportion of gross *transportation* receipts, the resort to gross receipts was sustained as a logical means of ascertaining the business done and, considered in connection with the *ad valorem* taxes assessed under the Maine system, has been regarded a fair effort to levy taxes on that part of the railroad lying within the State of Maine on a unit basis (210 U. S.), and partaking of the nature of a commutation tax. This interpretation of *Maine vs. Grand Trunk Ry. Co.*, has been approved in *Flint vs. Stone Tracy Co.*, 220 U. S., at pp. 162-5, and in *Oklahoma vs. Wells Fargo*, 223 U. S., 298, 301.

On the same basis were the taxes, based on gross receipts within the State, sustained in *U. S. Express Company vs. Minn., supra;* and in *W. & M. Ry. Co. vs. Powers*, 191 U. S., 379. In all of those cases the direct relation of receipts from interstate operations within the State to the value of property is obvious. Quoting from *Postal Tel. Co. vs. Adams*, 155 U. S., 688-696, 697, it was said in the *U. S. Express Co. Case, supra*, "* * * the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon

property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

The tax on gross receipts, from all sources, in *Oklahoma vs. Wells Fargo, supra,* was denounced on the principles announced in *Galveston, Harrisburg, &c., Ry. vs. Texas,* the court pointing out that it was bad as a gross revenue tax for including receipts from interstate commerce, and bad as a property tax for including elements of value which could not properly be considered in arriving at values in Oklahoma, under the authority of *Fargo vs. Hart,* 193 U. S., 490. In the *Texas* and in the *Oklahoma cases* it was pointed out as a material inquiry that both companies complaining had paid the usual *ad valorem* taxes.

In the case at bar, the plaintiff in error alleges, and reference to the Alabama Statutes will disclose, that the railroad of plaintiff in error pays, in addition to this co-called franchise tax, taxes on the full value (tangible and intangible) of its property in Alabama, on the unit basis, reckoned by the value of the shares of stock and bonds of the entire system, thus allocating to Alabama the maximum tax assessment which that State can lawfully assess on the property.

The privilege tax sustained in *Ohio Tax Case,* 232 U. S., 576, was levied on all general railroads alike, domestic or foreign, and was limited to a fixed percentage of their INTRASTATE earnings. No sound objection could be asserted on the ground of inequality or extra-territorial aggression, or an arbitrary and oppressive standard of measurement.

In *Kansas City Ry. vs. Kansas,* 240 U. S., 277, the court is careful to assert that a tax upon a corporate franchise "is not *necessarily* rendered invalid because it is measured by capital stock which may represent property not subject to the State's taxing power" (p. 232); and that it "cannot be maintained that an annual tax upon this privilege is *in itself, and in all cases,* repugnant to the Federal power

merely because it is measured by authorized or paid-up capital stock," but concluded with the observation that "undoubtedly, a tax may be in form a privilege tax and yet, in substance, may be a tax on property." In that case the tax was so limited that the tax could not exceed a fixed minimum and there was no question of the violation of the equal protection clause of the Fourteenth Amendment. The distinction, moreover, between a strictly domestic corporation all of whose capital stock was acquired and, in important particulars, invested under the protection of a State, which has the power to regulate within constitutional limits the administration of the corporation is radically different from the case of a consolidated interstate corporation, the capital of which is and has been responsive to the exclusive jurisdiction of other states and is, by the terms of the charter granted by the State proposing to levy the tax, forever excluded from employment within that State.

The franchise tax levied on navigation companies by New York and sustained in *Cornell Steamboat Co. vs. Sohmer*, 235 U. S., 549, was measured by gross intrastate receipts. The tax was one "levied upon the corporation for the privilege of carrying on its business in a corporate or organized capacity" and was sustained on the ground, *inter alia*, advanced by Chief Judge Cullen, of the New York Court of Appeals, and approved by this court, that "if the parties beneficially interested in the company are dissatisfied with the price exacted by the State for this privilege *they may carry on the business as individuals without paying any charge*. That the theory of option on behalf of the corporation to withdraw from business or to segregate interstate from intrastate business (or to reduce the capital stock made the measure of the tax in such cases) was clearly in the mind of the court in the *Baltic Mining Co. Case* is well pointed out and applied by Judge Grubb in *I. C. R. Co. vs. Miss. R. R. Comm.*, 229 Fed., 248 (255), and the same suggestion is reflected in the opinion in *Flint vs. Stone Tracy Co.* It

cannot be contended that the plaintiff in error has any option to retire or to resign its corporate franchise in the State of Alabama without the consent of that State, a consent which has never been extended.

Freedom of Selection and Equal Operation.

The principle of freedom of passage from one class to another on complying with the conditions applicable is the basis for the valid exercise by a State of the power of classification. If it should create classes, apparently operating alike on all who are within or may come within their respective definitions and presenting no legal obstacles to the passage by the members of one class to a more favored group, as suggested in the case cited, the classification, if reasonable, is classification in fact and not special or unconstitutional class legislation; but if in creating the groups for the purpose of taxation, a member or all of the members of any group are effectively forbidden even the theoretical right of transition, a different question is presented.

The immediate application of this principle to plaintiff in error is that it is prohibited not only by common law and statutory obligations from desisting from the operation of its lines established in Mississippi and Tennessee, but is prohibited by the terms of the franchise taxed from ever employing the capital there invested in Alabama or, as suggested in the *New York Steamboat case*, or in *Flint vs. Stone Tracy*, from ever divesting itself of this corporate capacity in Alabama and doing business as an individual. That power under the law of Alabama is totally lacking.

Further interstate application of the principle is seen in the case of *Flint vs. Stone Tracy Co.*, 220 U. S., 107, 151, 152, in which the court said:

> "As we said in the *Thomas Case*, 192 U. S., 363, *supra*, the requirement to pay such taxes involves the exercise of privileges and the elements of absolute

> and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

This result was necessary to avoid the contention that the tax was not an excise tax on business and on the use of franchises; but its application is extremely pertinent here in connection with our argument that the tax complained of is not only a tax on capital situated in Mississippi but affords plaintiff in error no equality of opportunity to avoid its incidence by qualifying in a more favored class.

The Kansas Bank Guarantee act was sustained in *Abilene, etc., Bank vs. Dolley*, 228 U. S., 1, as against an attack on the ground of discrimination against national banks for the reason, asserted by Justice Holmes, among others, that "the national banks are free to come into the scheme." The plaintiff in error is not able to take advantage of the classifications established by the scheme of taxation under which it is taxed for the inherent and overwhelming organic reasons above stated. In addition, there is to be noted the physical immobility commented on in *Southern Railway Company vs. Greene*, 216 U. S., at p. 414:

> "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. * * * The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

A most pertinent illustration of the principle of freedom of action is found in *Pullman Co. vs. Adams*, 189 U. S., 420, 429, where a tax in form against a legal subject-matter (strictly intrastate business by the Pullman Company) which apparently gave the sleeping-car company the right to refrain from paying the tax by refraining from intrastate business

in Mississippi, was nevertheless said to be accompanied by a provision of the State Constitution which would in effect require the company to transact intrastate business and subject it to the tax if it performed its interstate functions in the State. The court reached the conclusion that the tax would burden interstate commerce unless the Pullman Company were left free to renounce the privilege of doing intrastate business.

This principle was carried to its logical conclusion in *W. U. T. Co. vs. Kansas*, 216 U. S., 1, and following cases, where a tax for doing local business, unaccompanied by any practical power of renunciation, and measured on property beyond the jurisdiction, was denounced.

In the case at bar the inability to renounce is not merely physical. It is absolute and unconditional and includes not merely a practical disability to refrain from physical operations within the State, but an organic and legal inability even to go through the form of withdrawing as a legal entity.

If plaintiff in error should decline to pay the tax and seek to withdraw by desisting from intrastate business, continuing its interstate operations by virtue of its Tennessee and Mississippi status, it would be asserted that it was, as construed by the Supreme Court of Alabama, none the less an Alabama corporation and as such its agents, though doing no intrastate business, would be subject to interference and statutory penalties not indeed for transacting interstate business, but for failure to pay a domestic franchise tax.

It is clear, accordingly, that while this tax purports to be solely a domestic franchise tax it has, as applied to plaintiff in error, a much broader signification. It covers *all* of the corporate functions of plaintiff in error in Alabama and is not so apportioned as to leave room for any just contention that it is levied only on that privilege or status which the State effectively granted at the time of the consolidation.

Pacific Removal Cases, 115 U. S., 1.

Leloup vs. Mobile, 127 U. S., 640.

W. U. T. Co. vs. Williams, supra.
Pullman Co. vs. Miss., supra.
W. U. T. Co. vs. Kansas, 216 U. S., 1, and cases following that decision.

It has become settled law that the authorities commonly relied on to support the right of the States to levy franchise taxes upon foreign and domestic corporations, measured by their capital in other states, are not necessarily applicable to interstate railroad corporations, but we prefer to distinguish those cases absolutely.

We assert that the principle announced in *Home Ins. Co. vs. N. Y.,* 134 U. S., 594, and in *Horn Silver Mining Co. vs. N. Y.,* 143 U. S., 305, also in *Baltic Mining Co. vs. Mass.,* 231 U. S., 68, asserting the general proposition that the States may levy annual franchise taxes based on the capital stock of the corporations regardless of the *situs* of the property in which the capital is invested, and notwithstanding the non-taxable matter of the investments, is subject to definite qualifications on grounds which have no relation to interstate commerce or to the option of withdrawal or the divisibility of interstate and intrastate commerce. Taking the case of *Horn Silver Mining Co. vs. N. Y.,* we find an assertion by Mr. Justice Field to the effect that even conceding that the fee exacted from the foreign corporation in that case was a tax (meaning presumably a direct tax on the capital of the corporation) and not a license to do business in New York, yet

> "Conceding such to be the case, we do not perceive how it in any respect affects the validity of the tax."

That view no longer reflects the attitude of this court, for it is now settled beyond question that any effort by the State to tax capital or property not within its jurisdiction is beyond the power of the State, even where made a condition to the exercise of a privilege which the State might

absolutely refuse. In short, no longer can a State attach an unconstitutional condition to the grant of privileges within its control. *N. Y. Life Ins. Co. vs. Heard, supra; Harrison vs. St. L. & S. F. R. R. Co.*, 232 U. S., 318, main brief, proposition XI, p. 19.

The case was accordingly decided on at least one untenable theory. Yet those cases may be fully accepted without prejudice to any contention of plaintiff in error.

A tax on the franchise of an ordinary or strictly domestic corporation based on or measured by the total capital stock of the corporation may properly be said to have some relation to the franchise taxed, in such wise as to relieve the tax from the criticism of being levied directly upon the capital, for the reason that the ordinary domestic corporation has at least the option and privilege of employing all of its capital within the State of its origin, and it may properly be taxed for the maximum privilege authorized. In like manner, in *Horn vs. Silver Mining Co.*, it may be said, as was said in the later case of *N. Y. State vs. Roberts*, 171 U. S., 658, that the foreign corporation taxed on the basis of its capital had the privilege and option of employing all of the capital in the State of New York. For that reason the privilege or franchise taxed may properly be said to be the privilege of employing all of the capital of the foreign corporation in New York, and the tax might accordingly be measured by the total capital included within the privilege without inviting the objection that the use of foreign capital to determine the value of the privilege or measure a tax upon it was arbitrary and in effect a tax on the capital.

For precisely the same reasons the franchise tax in *Home Ins. Co.*, levied against the domestic corporation and measured by its capital, although the latter was at the time invested partly in non-taxable securities, may be fully sustained on the theory that the investment of the capital in those securities was optional on the part of the domestic corporation, which had the privilege and power under its franchise from the State of employing its capital in any

avenue that it saw fit. In other words, it was employed potentially in taxable securities and property, if not actually; and it would be clearly unreasonable to require the State to follow the capital in and out of taxable and non-taxable investments, as the corporation enjoying the privilege might elect.

But assume in any of the foregoing cases, as is the case here, that the foreign or domestic corporation were prohibited by the franchise itself or by concurrent prohibitory legislation of the State of New York from employing any part of its capital in that State or using it under the franchise taxed or *requiring* its investment in non-taxable property, or suppose this result were made mandatory as a result of some act of Congress for the exclusive benefit of the National Government affecting all or a part of the capital and withdrawing it from use under the State franchise. It is clear that in cases of this kind the capital of a corporation which cannot possibly be used under the privilege would be an arbitrary and indefensible measure to determine a tax on the franchise, particularly if there are others of the same class and taxed on the same basis who were not prohibited from employing their entire capital in the uses privileged by the franchise.

For an equally imperative reason the tax would be denounced as a direct tax on the non-taxable property. In such case the freedom of use or potential use under the franchise would be lacking and the *necessary* incidence of the tax would fall on the non-taxable property to the extent that it afforded any measure for the tax.

This is the effect of the illustrative cases above cited in which it is shown that an option to use a privilege may be taxed to the extent of its potential rather than its actual exercise and as showing that an option of withdrawal from a privilege is necessary to protect capital employed under a privilege from the "absolute and unavoidable demand" which would otherwise characterize a tax on the privilege. *Flint case*, 220 U. S., 151, 152, *supra*.

Equal Protection of the Laws.

In addition to the conclusive authorities of *Southern Ry. vs. Green*, 216 U. S., 400, and other authorities and arguments contained in our main brief, we respectfully invite the court's attention to the following suggestions in support of the contention of the plaintiff in error: that it is denied the equal protection of the laws by this tax.

It seems to be recognized in *Flint vs. Stone Tracy Co.*, 220 U. S., 107, that if it had been shown by any of the plaintiffs in error that foreign corporations were favored under the operation of the act just complaint might have been made. The fact that there would be no reasonable distinction between the burden of this tax as applied to a domestic corporation and as applied to a foreign railroad corporation engaged in identically the same business in the same manner is no longer an open question. In this case the analogy to the principle of the *Green Case* is even closer than the parallelism between foreign and domestic corporations considered in that case, for the reason that, although, for certain purposes local to the jurisdiction of Alabama, plaintiff in error is a domestic corporation, it is substantially and ultimately foreign to that State in respect of its Mississippi and Tennessee origin and attributes. Compare *Louisville, etc., Ry. Co. vs. Louisville*, 174 U. S., 552; *Nashua Railroad vs. Lowell Railroad*, 136 U. S., 356, Main Brief, Proposition II, p. 16.

What we have stated above with reference to the propriety of using capital stock as a standard for measuring a tax on franchises is clearly pertinent in this connection. Both foreign and strictly domestic corporations in Alabama have the privilege under their respective franchises from Alabama of employing their total capital within the State of Alabama, but not so with the plaintiff in error. The franchise itself excludes the possibility of employing the Tennessee or Mississippi property or capital within this State. Plaintiff in

error is accordingly taxed on the basis of that which it can never employ in Alabama or bring under the protection of the laws of that State, whereas strictly domestic corporations are taxed on no such basis. It is accordingly arbitrary and a denial of equal protection to impress this tax on plaintiff in error, which has no option of transition into a more favored class or of exercising the franchises to the point of maximum use on which franchises are taxed in Alabama. Any theoretical right it might have in that respect is excluded, not merely by physical and practical considerations, but by the terms of the franchise itself, which is sought to be taxed.

That the classification singling out plaintiff is wholly unreasonable is supported by the well-considered opinion in *Detroit, etc., Co. vs. Michigan*, 205 Fed., 89, where corporations chartered by special act were singled out for burdensome distinction.

In a case decided April 24, 1916, this court held the Louisiana sugar act unconstitutional for denying equal protection to plaintiff in error, a sugar refiner, which had a plant and did refine sugar in Louisiana, on the ground, among others, that "if a powerful rival of the plaintiff should do no refining in the State it might systematically pay a less price for sugar in Louisiana than it paid elsewhere, with none of the consequences attached to doing so in the plaintiff's case. So of any one who purchases but does not refine." etc. *McFarland vs. American Sugar Co.*, 241 U. S., 79, 86.

In the case at bar those foreign corporations which do engage in identically the same business in Alabama and in identically the same way as plaintiff are let off with a tax on the actual amount of capital which they employ under the franchise granted by Alabama to that end. Plaintiff in error, on the other hand, is required to pay a franchise tax for exercising identically the same functions in Alabama on capital which it is prohibited from employing in Alabama.

The factor determining the tax in case of foreign corporations is reasonable. It has a fair relation to the value and

scope of the privilege granted it by the State. It makes the foreign corporation pay for what it uses, whereas it requires the plaintiff in error to pay for what it can never use under its Alabama franchise, and is accordingly arbitrary and irrational as a standard for measuring the franchise granted plaintiff in error.

For the same reason it discriminates, as above stated, between plaintiff in error and domestic corporations which employ their capital under the franchise or have the option or privilege of so employing it or which enjoy the actual, constructive, or potential protection of Alabama in respect to such capital or which derived or acquired that capital as a result of the effective legal processes of Alabama.

The difference in classifying railroad corporations in a separate class for the purpose of taxation, as distinguished from individuals who may own and operate railroads, may be justified by the fact that railroad corporations, *as such*, are vested with different and greater powers than other corporations or individuals. Obviously, railroads enjoying and using the same franchise in the same way should be placed in the same class. *Michigan Railroad Tax Cases*, 201 U. S., 245.

In *Barbier vs. Connolly*, 113 U. S., 27, 31, this court said that the Fourteenth Amendment means that—

> "No greater burdens should be laid upon one than are laid upon others in the same calling and condition."

Exceptional and Unnecessary Construction.

In conclusion we respectfully assert that the construction of the Alabama statute established by the Supreme Court of Alabama was wholly unnecessary to sustain any fair or effective administration of the laws of that State.

This court said in *United States vs. Goelet*, 232 U. S., 293:

> "* * * the taxing power when exerted is not usually applied to those, even albeit they are citizens,

> who have a permanent domicile or residence outside of the country levying the tax. Indeed we think it must be conceded that the levy of such tax is so beyond the normal and usual exercise of the taxing power, as to cause it to be, when exerted, of rare occurrence and in the fullest sense exceptional."

Applying the foregoing observation to the tariff act of 1909 (section 37), this court evidenced no hesitation in reaching the conclusion that the words "any citizen" as used in that section did not apply to [the use of a foreign-built yacht owned by] a citizen of the United States who was permanently resident and domiciled in a foreign country during the tax period involved. Neither section 229 of the Constitution of Alabama (1901) nor section 12 of the revenue act of 1911 reasonably requires the construction that the franchise tax applicable to plaintiff in error, if at all, must be reckoned on its capital employed exclusively and permanently in Mississippi and Tennessee, a result which would be "in the fullest sense exceptional."

A reversal of this case will result in a more equitable operation of those laws and one, moreover, that will be in line with the tendency exhibited by progressive States to respect the bounds of sovereignty and avoid oppressive double taxation.

In *Ohio & M. R. R. Co. vs. People,* 123 Ill., 467, construing the constitutional provision of the State of Illinois, which required a majority of resident directors in the case of all corporations organized under the laws of Illinois, that court held that the provision did not apply to corporations *consolidated* under the laws of Illinois with foreign corporations, on the ground that it would be a gross breach of faith and a spoliation of private right to hold otherwise. The court said, in the course of an elaborate demonstration of the interstate chaos which would result from a different construction:

> "To hold that the constitutional provision is applicable to appellant corporation would be to determine that the framers of that instrument in drafting

> and submitting this section and the people in adopting it, intended that the State of Illinois should break faith with her sister States and should become a despoiler of private right, for, on the faith of the legislation of Illinois the other States had, by like legislative action, authorized the corporations existing as domestic corporations in those States to unite their property and franchises with a corporation of this State, whereby both public and private rights were greatly affected. * * * Although States may not enter into formal treaties and conventions, or agreements and compacts, they may and, we venture to say, should, be exemplars of good faith and fair dealing, by faithfully observing such obligations as legitimately spring from their co-operating legislation."

Apportionment to Determine Inheritance Taxes on Capital Stock of Interstate Corporations.

A sharp distinction in favor of the contentions of plaintiff in error is to be noted between the status and franchise in each State of a corporation consolidated by the union of domestic and foreign companies and the case of an interstate corporation merely holding distinct charters from several States. Yet in fixing inheritance taxes on the devolution of shares of stock in corporations of the latter class the highest courts of New York, Massachusetts, and New Hampshire have required an apportionment of the value of the stock as between the States concerned, in opinions which sustain the theory of this argument:

In re Cooley, 186 N. Y., 220.
Kingsbury vs. Chapin, 196 Mass., 533.
Gardiner vs. Carter, 74 N. H., 507.
Bridge Co. vs. Metz, 32 N. J. L., 199.

These courts, unlike the Supreme Court of Alabama, to use the language of Judge Bartlett in the case first cited, saw--

> "nothing in the statute which prevents us from paying decent regard to the principles of interstate comity."

It is our contention here that in the case of a consolidated corporation situated as plaintiff in error, owing a direct corporate allegiance to Mississippi and Tennessee, which was recognized by the Alabama franchise as permanent and concurrent with the allegiance due the State of Alabama, the latter State cannot impose a "franchise tax" not expressly limited to its own franchise or levy such tax on plaintiff in error under the circumstances of this case without taxing property beyond its jurisdiction, denying to plaintiff in error the equal protection of the laws and interfering with interstate commerce.

Respectfully submitted,

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(32207)

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1916.
No. 586.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, *Plaintiff in Error,*

vs.

JAMES P. STILES, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR.

The Kansas City, Memphis & Birmingham Railroad Company, Plaintiff in Error, in the above styled cause, filed a complaint in the City Court of Birmingham, Alabama, against James P. Stiles, Defendant in Error, who was at the time and is now Judge of Probate of Jefferson County, Alabama, to recover certain sums of money paid, under protest, by said railroad company as an annual franchise tax upon its paid-up capital stock demanded to be paid by said Stiles, defendant in

error, by and under the provisions of the laws of Alabama (Record, pp. 12 to 18). Demurrers to the complaint were filed (Record, pp. 18, 19), the complaint was afterwards amended (Record, pp. 19 to 14). Demurrers were filed to the amended complaint (Record, p. 24). Finally demurrers were sustained to each count of the amended complaint and the plaintiff declining to plead further, judgment was rendered in favor of the defendant (Record, p. 25). Thereupon the plaintiff in error appealed the case to the Supreme Court of Alabama from the judgment of the City Court of Birmingham (Record, pp. 25, 26). On the submission of the appeal in the Supreme Court of Alabama, the judgment of the City Court of Birmingham was affirmed and the demurrer to the complaint held properly sustained (Record, pp. 29, 30). The plaintiff in error filed in the Supreme Court of Alabama a petition for a writ of error to this Court, and the writ prayed for was allowed.

STATEMENT OF THE CASE.

At the time this brief was prepared, we had not been served with a copy of the brief of counsel for plaintiff in error.

Plaintiff in error is a railroad corporation formed under the laws of Alabama (Part 2d, Title 1, Chap. 6, Civil Code Alabama, 1886, adopted February 28, 1887) by consolidation of an Alabama corporation with two others of Tennessee and Mississippi respectively. The original constituents were K. C., M. & B. R. R. Co., a corporation of Tennessee, subsequently consolidated as K. C., M. & B. R. R. Co. under the laws of these two states, and Memphis & Birmingham R. R. Co., a corporation of Alabama; the first consolidated company and the Alabama corporation being afterwards consolidated as the present plaintiff in error in Alabama. The total paid up capital stock of plaintiff in error is admitted (Record, p. 2) to be $5,976,000.00, of which, however, it is claimed only $2,443,586.40 is represented by or invested in its assets in Alabama. Defendant in error, Stiles, who is Judge of Probate of Jefferson county, Alabama, demanded, so alleges the complaint, that plaintiff in error pay to him as Judge of Probate of Jefferson county, Alabama, wherein the tax was due, the sum of $2,368.25, as and for the franchise tax due from plaintiff in error for the year 1911 as a domestic corporation under section 12 of an Act to further provide for the revenues of the State of Alabama, approved March 31, 1911 (General Acts 1911, p. 170). This amount was the correct sum, estimated according to said section 12, on the paid up capital stock of plaintiff in error, or is conceded to be such. Plaintiff in error paid the tax to Stiles, as Judge of Probate, under protest and with notice that suit would be brought for its recovery. Suit was accordingly brought

against Stiles in the City Court of Birmingham and upon judgment on demurrer against the corporation, appeal was taken to the Supreme Court of Alabama, the highest court in the State in which a decision could be had. As the four counts of the complaint raise substantially the same question it will suffice to consider them together. It is set forth that the corporation is a consolidated company under the laws of Alabama, that its total paid up capital stock is $5,976,000.00, but that only $2,443,568.40 thereof is invested in or represented by assets in Alabama; that only the $2,443,568.40 is properly liable to franchise tax; that franchise taxation on the balance is an attempt to reach extra-territorial assets and void; that the corporation is denied due process of law and equal protection of law in that it is taxed differently from a *foreign* corporation having a part of its assets in Alabama; and finally, that the imposition of the franchise tax in this case is a burden upon or interference with interstate commerce of which a large part of the business of plaintiff in error consists.

Plaintiff in error, in short, complains of the statute, because, though a domestic corporation, it is not treated like a foreign corporation; because, as alleged, it interferes with interstate commerce.

The real party in interest is, of course, not Stiles, but the State of Alabama, and the case involves directly the right of the State to levy a franchise tax upon its own corporations based upon the amount of their paid up capital stock.

ARGUMENT.

If the contention of plaintiff in error is to be sustained, obviously the State cannot levy franchise tax on this basis in any instance where the corporation has part of its assets outside the State. The importance of the question to the State justifies consideration at some length, not only as applied to the particular facts of this case, but in its general aspects and as a part of the right of the State to regulate and control its own creations. It is this right of the State which is on trial and not Stiles, who acted merely as the ministerial agent of the taxing power.

PROPOSITIONS OF LAW.

It is insisted on behalf of defendant in error, that is to say, on behalf of the State, that the following propositions effectually conclude the position taken by the railroad company:

First. When the constituent companies sought and obtained a franchise from the State of Alabama as a consolidated corporation they did so with full, actual or constructive notice of the constitutional and statutory law of the state and of its inherent right to modify its treatment of its own creations, and that, in accepting the franchise as a consolidated corporation in Alabama they agreed then and there to be governed by such limitations and burdens, present or future, as the State might see fit to impose as a condition of enjoyment of the franchise granted; that, therefore, the consolidated corporation as an Alabama organization is liable to each and every burden placed upn others in like situation.

Second. That the taxation upon paid up or outstanding capital stock, regardless of the situs of the property rep-

resented thereby, is not an attempt to reach extra-territorial assets, but is an entirely legitimate exercise of the taxing power.

Third. That there is no interference with interstate commerce, and, as a necessary consequence of the first two propositions, no denial of due process of law or equal protection of law.

In this case these propositions are practically corollaries of each other, but so far as possible will be discussed separately, particularly as the first two are of great importance to the State regardless of what may be said of the last with special reference to the question of commerce.

FIRST.

Section 12 of the Act of the Alabama Legislature of March 31, 1911, is specific, and makes the franchise tax on the basis of paid up stock apply to "All corporations *organized under the laws of this State.*" The former statute, Subdiv. 26, Sec. 2361, Code 1907, limited the classification to those *doing business in this State.* It is intended by the present statute to impose a tax upon the *right to exist* as a corporation. Therefore, provided plaintiff in error exercises the right to exist as an Alabama corporation, it is liable to the tax unless some constitutional right is infringed.

The first inquiry is whether the corporation is "organized under the laws of this State." The enabling statute leaves no doubt on this score. Secs. 1583, Part 2nd, Chap. 6, Code of Alabama 1886, specifically provides:

> "Every such *new corporation* so formed shall * * * be in all respects subject to the laws of the

State of Alabama as a DOMESTIC CORPORATION." (Italics added.)

The exact question, however, is settled by this Court in *Stone v. Farmer's Loan & Trust Co.* (R. R. Commission Cases), 116 U. S. 307, where it is said in substance:

A railroad company chartered by, and carrying on its business in two or more states, is, *for all purposes of local government,* a domestic corporation in each state, and, within each state, subject to its laws as to all matters not within the exclusive control of Congress.

See, also:

Memphis & C. R. Co. v. Alabama, 107 U. S. 581;
Graham v. Boston, etc., 118 U. S. 161;
L. N. A., etc., v. Louisville Tr. Co., 174 U. S. 552;
Phila. W. & B. R. R. Co. v. Maryland, 10 How. 376;
And the great number of authorities collected in 10 Cyc., pp. 170, et seq.

It is entirely clear, therefore, that the corporation became and is now "organized under the laws of this State," and we may now consider what burdens it undertook and what conditions it agreed to abide when it originally took advantage of the favor of the State and accepted its franchise.

Under the specific reservation of Par. 10, Art. XIV, Const. 1875, the State was entirely free to subsequently impose such conditions as it saw fit to the exercise of the franchise originally granted. While it may be conceded that the State could not directly interfere with the interstate commerce business of the corporation or subject

it to unconscionable or unconstitutional deprivations as a condition to continued existence, it certainly reserved "for all purposes of local government" "all matters not within the exclusive control of congress."—*Stone v. Farmers L. & T. Co., supra.* Practically the one thing the corporation could be sure of in accepting its Alabama charter was that each succeeding Legislature would doubtless modify the conditions under which existence in Alabama was possible. These conditions, as well as the charter powers, could be modified at the will of the State.

Jeff. Coll. v. Wash. & Jeff. Coll., 13 Wall 190;
Hamilton G. & Co. v. Hamilton, 146 U. S. 258;
Maine C. R. Co. v. Maine, 96 U. S. 499;
N. Y. & N. E. R. R. Co. v. Briston, 151 U. S. 556;
N. Y. ex rel. Schurz v. Cook, 148 U. S. 397;
N. Y. ex rel. M. S. R. Co. v. State Bd,, 199 U. S. 1.

Exemption from future legislation did not exist:

C. M. & St. P. R. Co. v. Minn. R. R. Coms., 134 U. S. 418;
Ga. R. & B. Co. v. Smith, 128 U. S. 174;
Penn. R. Co. v. Miller, 132 U. S. 75;
Spring Valley Wh. v. Schottler, 110 U. S. 347;
Ruggles v. Ill., 108 U. S. 526;
Ill. Cen. R. Co. v. Ill., 108 U. S. 541.

In addition, in 1901 a new State Constitution was adopted, which reiterated the reservations of the earlier instrument (Sec. 238) and specifically set forth (Sec. 229);

> " * * * The Legislature shall, by general law, provide for the payment to the State of Alabama of a *franchise tax by corporations organized under the laws of this State, which shall be in proportion to the*

amount of capital stock. * * * The charter of any corporation shall be subject to amendment, alteration or repeal under general laws."

At this time the consolidated corporation was and had been for years enjoying the favor of the State as a "corporation organized under the laws of this State." It already knew that its charter rights could be absolutely abrogated, much less modified, at the will of the State. With the new Constitution it took notice of the mandatory provision as to franchise tax on corporations organized in Alabama, and of the new and specific provision that all charter powers were subject to change even by general law. That is to say, any general law could be passed, otherwise valid, notwithstanding that its effect was to cut down some of the charter rights or privileges of existing corporations.

The case of *Ashley v. Ryan*, 153 U. S. 436, frequently cited with approval, clearly defines the inherent power of the State to fix its own terms and conditions upon the enjoyment of its franchises.

In that case the Court was considering a situation where five railroad companies, each of different state origin, and having respective paid up capitals of $700,000; $300,000; $9,000,000; $12,000,000; and $30,000,000; consolidated under the laws of Ohio, taking advantage of a statute similar to that under which plaintiff in error acted. The constitutent corporation, of $700,000 original capital, was of Ohio, so that in lieu of $52,000, or one-tenth of one per centum of the total $52,000,000 capital of the consolidation, $700, the same percentage on the $700,000 of the Ohio constituent, was tendered to the Ohio Secretary of State, upon the identical theory, here advanced by plaintiff in error, that the State of Ohio had no right to look

to the capital stock represented by property in other states, and that the exaction of the balance of the $52,000 would be unconstitutional and void. The $700 was refused and $52,000, the correct amount, one-tenth of one per cent. of the total capital, demanded. The money was paid and, as in the case at bar, suit was brought for its recovery on practically identical questions of law; that is to say, the supposed attempt of the state of Ohio to tax property beyond its borders and to interfere with interstate commerce, with the corollaries of denial of due process and equal protection of the law.

As said in that case by Mr. Justice White:

> "The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain privileges, powers and immunities which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by grant of the State of Ohio and depended for their existence upon the provisions of its laws. Without the state's consent they could not have been procured. Hence, in seeking to file its articles the company was applying for privileges * * * which it could by no means possess, save by the grace and favor of the Constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the state charged the parties with notice that the benefits which it sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. * * * The act of filing, *constituting as it did, a claim of right to the franchise*" (italics added) "carried with it a voluntary assumption of any burden with which that privilege was accompanied, and without which

the right of corporate existence could not have been procured. * * * Having thus accepted the act of grace of the state * * * the company cannot be permitted to hold on to the privileges * * * granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. * * *

" * ** Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another state. The power of corporations of other states to become corporations or to consolidate themselves under the Ohio statutes * * * is as completely dependent on the will of that state as the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws.—*Bank of Augusta v. Earle,* 13 Peters 519; *Lafayette Ins. Co. v. French,* 18 How. 404; *Paul v. Virginia,* 8 Wall. 168."

After quoting from Mr. Justice Field in the last-named case, Mr. Justice White concludes:

"It follows from these principles that a state, in granting a corporate privilege to its own citizens, *or what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws*" (italics added) "* * * may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. * * *".

"The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations may be availed of."

" * * * We conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, * * * and that enforcement involved no attempt on the part of the state to extend its taxing power beyond it territorial limits."

And it has been said:

"The state may also exact a bonus or even a portion of the earnings of such corporations (organized by it and engaged in interstate commerce) as a condition to the granting of its charter.—*Covington & C. B. Co. v. Commonwealth of Ky.*, 154 U. S. 204."

See, also:

L. & N. v. Ky., 161 U. S. 703;
Interstate Con. St. R. Co. v. Mass., 207 U. S. 84.

"A corporation, being the mere creature of the Legislature, its rights, privileges and powers are dependent solely upon the terms of its charter."—*Horn Silver Mining Co. v. People of N. Y.*, 143 U. S. 305.

"The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered *as property separate and distinct* from the property which the corpor-

ation itself may acquire." (Italics added.)—*Horn S. Mining Co. v. People, supra.*

"According to the law of most states this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation. The right of the state to thus tax it has been recognized by this court and the state courts in instances without number. * * *

"The granting of the rights and privileges which constitute the franchise of a corporation being a matter resting entirely within the control of the Legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the Legislature may deem most suitable to the public interests and policy. * * * It may impose as a condition of the grant as well as, also, of *its continued* exercise the payment of a specific sum * * * and may prescribe such mode in which the sum shall be ascertained. * * * There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations."—*Horn S. Mining Co. v. People, supra.*

Four elements of taxable value may be found in a corporation, viz.: THE FRANCHISE, the capital stock in the hands of the corporation, the corporate property, and the shares of capital stock in the hands of the individual stockholders.—*Tenn. v. Whitworth,* 117 U. S. 139.

Where there is no express contract against taxation in the charter of a corporation, *it takes its charter subject to the same* right of taxation in the state that applies to all other privileges or property.—*N. O. C. & Lake R. Co. v. New Orleans,* 143 U. S. 192.

It is clear, therefore, from these authorities selected from the many in point, that in accepting its charter plaintiff in error submitted to all such conditions as might lawfully be imposed on all domestic corporations in Alabama since the State Constitution of 1875. It had no right whatsoever to object if the State sought to impose a tax on that part of the taxable property, the corporate franchise, the situs of which from the nature of it, lay wholly within Alabama. The only point of attack on the action of the Legislature must be on the ground that the tax was so onerous, unexpected and unreasonable, that it deprived plaintiff in error of some right which could not have been lawfully surrendered even as a condition of existence in the State.

SECOND.

The very pleadings in the case carry with them the conclusive answer to the contention that the statute (Sec. 12, Alabama Act March 31, 1911) seeks to tax extra-territorial assets. It is not sought to tax all the franchises of the corporation but merely that franchise which exists and is in Alabama—the right to exist as an Alabama corporation with a paid-up capital stock of $5,976,000. This $5,976,000 of stock is the total of the aliquot parts of the right of existence in Alabama. It is conceded that the property of the corporation is in Alabama only in part. But its franchise as a corporation is in Alabama. The State taxes only that which is within its borders. It is not taxed as worth $5,976,000, nor is any assumption indulged that such is the actual value of the franchise. The rule of franchise tax assessment—and an entirely reasonable and equitable one it is—merely estimates the amount of franchise tax or license which shall be paid upon each thousand dollars *par value* of the paid up stock. There is no effort to

place a tax on the property of the corporation considered separate from the franchise. It is purely and simply a license to exist as a corporate body with capital stock and the license is fixed with regard to the quantum of stock, and absolutely irrespective of howsoever the money subscribed for that stock may have been converted.

It is competent for a state to impose a franchise tax upon a corporation for the privileges conferred by its charter, irrespective of what disposition the institution has made of its funds, or in what manner they have been invested.

Provident Ins. for Svgs. v. Mass., 6 Wall. 611.

"The 'corporate franchise' * * * is the right or privilege of being a corporation. * * *"

Home Ins. Co. v. New York, 134 U. S. 594.

If this right or privilege of being an Alabama corporation does not exist in Alabama, where is it? Certainly it is not in Mississippi and Tennessee. The consolidated corporation is in all three of the states, domestic and at home in each, perhaps, but not by virtue of the Alabama franchise.

Horn Silver Mining Co. v. People, supra, is particularly illustrative of the fallacy that there is attempted extra-territorial taxation. The corporation in that case was organized under the laws of Utah and doing business in New York as a manufacturing corporation. After it had for some time been so engaged an Act of New York fixed a tax upon the "corporate franchise or business" of corporations, foreign as well as domestic, measured with reference to the par value of their capital stock. It was ascertained that the greater part of the property of the com-

pany was in Utah and Illinois; that it paid taxes in both these places. In this case Mr. Justice Field said:

> "There seems to be a hardship in estimating the amount of the tax upon the corporation for doing business within the state, according to the amount of its business or capital without the state. That is a matter, however, resting entirely within the control of the state, and with which, of course, this court can in no way interfere."

It may be sufficient to refer to the thirteen different methods of estimating franchise tax cited in Am. & Eng. Ency. Law, (2d Ed.) Vol. XXVII, p. 932, among them the method here discussed, that is to say, on the par value of the stock. The Supreme Court of Alabama has defined a franchise tax in *Stonewall Ins. Co. v. State,* 89 Ala. 335, and *Phoenix Carpet Co. v. State,* 118 Ala. 143.

See, also:

> *Ohio, etc., v. Weber,* 96 Ill. 443;
> *Keokuk, etc., Bridge Co. v. People,* 161 Ill. 132.

The latter case holding that the total capital stock of a consolidated company formed in Illinois was properly taxable there.

THIRD.

There remains but the contention that plaintiff in error is unjustly discriminated against, denied equal protection and due process of law, because not treated like a foreign corporation, and that all of these amount to interference with interstate commerce.

The answer to all of this is elementary:

"A state may in any way control or even extinguish a corporation incorporated by it even though such corporation is engaged in interstate commerce."

7 Cyc. 444, note 62, and cases cited.

The state has the right to discriminate between its own and foreign corporations in regard to doing business within the state.

Ducat v. Chicago, 10 Wall. 410;
Paul v. Virginia, 8 Wall. 168;
Augusta Bank v. Earle, 13 Peters 519.

"Unless restrained by some constitutional provision for the equal taxation of all property within the state applicable as well to corporations as to individuals, it is competent for the legislature to divide corporations into various classes for the purpose of taxation."

37 Cyc. 741.

"A distinction between domestic and foreign corporations, in respect to the assessment or rate of taxation on their property, franchises, or business, is a natural and reasonable one and is within the powers of the legislature."

37 Cyc. 748, and cases cited;
Sturgis v. Carter, 114 U. S. 511;
Horn Min. Co. v. N. Y., 143 U. S. 305;
Norfolk v. Penn., 136 U. S. 114;
Pembina Con. Min. Co. v. Penn., 125 U. S. 178;
Liverpool, etc., v. Oliver, 10 Wall. 566;
Ducat v. Chicago, 10 Wall. 410;
Paul v. Virginia, 8 Wall. 168.

In *Minot v. Phila. R. Co.,* 18 Wall. 206, in the case of a consolidated carrier corporation, as here, Mr. Justice Field said:

> "The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their *franchises* (italics added), * * * cannot be regarded as conflicting with any constitutional power of Congress."

The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be ascertained, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion.

All the questions in this case, however, may be regarded as completely settled by *State Tax on Railway Gross Receipts Case,* 15 Wallace 282. This case, decided with two other from the same state, Pennsylvania, fixed the limits of interference with interstate commerce by the taxing power of a state on a corporation of that state.

A tax, defined to be a franchise tax, of one-fourth of one per cent. upon the gross receipts from its business, was sustained as to an interstate carrier incorporated in Pennsylvania as a legitimate exercise of the right of the state to tax the franchise. The case is distinguished from the others argued with it one of which involved a tax on freight carried at so much per ton. This last was held to be a direct interference with interstate commerce, of course, and void—the other, however, was not such an interference as went beyond the power of the state to tax its own franchise.

These cases have been since many times construed and followed. In *Fargo v. Michigan,* Mr. Justice Miller (121

U. S. 240) said of the *State Tax on Railway Gross Receipts Case*:

> "The whole question has been so fully considered in these decisions, and the cases themselves so carefully reviewed, that it would be doing little more than repeating the language of the arguments used in them to go over the ground again."

There is no question raised in the case at bar not entirely concluded against plaintiff in error by the opinion in *State Tax on Railway Gross Receipts Case*. Here we have, as there, a corporation organized under the laws of a state and admitting it, but complaining that the Legislature did not see fit to violate the State Constitution and treat it identically as it did foreign corporations and that the treatment it did receive—precisely that extended to its fellow domestic corporations—is for this reason void, deprives it of due process of law and equal protection of law and burdens or interferes with its interstate commerce.

The foregoing is perhaps sufficient to conclude the questions here raised, but it appears from brief of plaintiff in error filed when the case was submitted in the Supreme Court of Alabama that reliance is placed on the cases of *Greene v. Southern Railway*, 216 U. S. 400, and the cases therein cited, among them *Western Union v. Kansas*, 216 U. S. 1.

The following authorities are complete conclusions of the position there taken by plaintiff in error:

In *Ficklen v. Taxing District Shelby Co.*, 145 U. S. 1, Chief Justice Fuller said:

> "It is well settled that a state has power to tax all property having a *situs* within its limits whether em-

ployed in interstate commerce or not. It is not tax
because it is so employed, but because it is within t
territory and the jurisdiction of the state."

In *Phila. S. S. Co. v. Penn.*, 122 U. S. 326, Mr. Justi
Bradley said:

"The corporate franchise, the property, the bu
ness, the income of corporations created by a sta
may undoubtedly be taxed by the state."

Where domestic and foreign railroads consolidate
terms which in effect require the consolidated compa
when operating in the state to be subject to its laws t
state may legislate for the company in that state precis
as it could have legislated for its own original compa
if no consolidation had taken place.

Peik v. Chicago, etc., R. Co., 94 U. S. 164.

It is the established doctrine that so long as the tax la
of the state do not directly interfere with rights secu
by the Federal Constitution they are valid and legitima

Kirtland v. Hotchkiss, 100 U. S. 491;

"Whatever the particular form * * * if it
substantially a *property tax* it will not be consider
as falling within the inhibition of the constitution.

Postal Tel. Cable Co. v. Adams, 155 U. S. 688;
Adams Express Co. v. Ohio, 165 U. S. 194;
N. Y., etc., R. Co. v. Penn., 158 U. S. 431.

In the *Postal Telegraph Case* referred to, the tax was assumed to be and called a franchise tax, but as it was based on assets in the state was sustained as a property tax.

The distinction between such cases as that of *Southern Railway v. Greene* and *Kansas v. Western Union* and the case at bar is entire. In *Southern Ry. Co. v. Greene* there was an enormous difference in the tax rate between the domestic and foreign corporations in like cases. Domestic corporations were required to pay a trifling tax under Subdivision 26, Section 2361, Code 1907, ranging from $10 to a maximum of $500 for corporations of a million dollars or more outstanding capital stock. The rate of taxation on a foreign corporation was very much greater. So much greater that this court held the foreign franchise tax invalid on the ground, and no other, that it was a denial of equal protection to the foreign corporation already within our gates to tax it at a rate so disproportionate to that applied to the domestic. It was the enormous disparity of the two rates, not the method or basis of estimating the size of the amount upon which assessment was to be made that determined this case.

In the case of *Western Union v. Kansas* there was an arbitrary effort on the part of the State of Kansas to coerce the Western Union. Admittedly there were only two telegraph companies within the terms of the act. The case, however, did not turn on the attempt to reach extra-territorial assets, for there was none, but upon the denial of due process of law—upon the entirely unreasonable basis proposed by Kansas as a condition of the further continuance of the intrastate business of the telegraph company. No aspect of either of these cases helps the position of plaintiff in error in any degree.

Examination of the authorities shows that it is established law, and recognized, that every tax upon property, occupation, or franchises, affects more or less commerce, yet to be invalid as an interference it is necessary for the interference to be direct and not merely an incidental effect of the requirement of the usual proportional contribution to public maintenance.

> *State Tax on Railway Gross Receipts,* 15 Wall. 282;
> *Delaware Railway Tax,* 18 Wall. 206;
> *Brown v. Houston,* 114 U. S. 622;
> *Bowman v. Chicago, etc., R. Co.,* 125 U. S. 465;
> *Amer. Refrig. Transit Co. v. Hall,* 174 U. S. 70;
> *N. Y., etc., R. Co. v. Penn.,* 158 U. S. 431.

The latest case decided by this court in which the proposition we here have, was considered is that of *Kansas City, Ft. Scott & Memphis R. R. Co. v. Bodkin, Secretary of State of the State of Kansas,* decided February 21, 1916, 240, U. S. 227, where a Kansas statute, very similar to the one here under consideration, was considered and was held valid. Mr. Justice Hughes, in considering the criticism which is made of our Alabama statute, there said:

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the state. The authority of the state to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power."

We respectfully submit that a consideration of the case and a survey of the decisions of this court expository of the principles that restrict state taxation of corporate franchises can only lead to the conclusion reached by the Supreme Court of Alabama in this case and in the case of *Kansas City, M. & B. R. Co. v. Stiles, Judge,* 182 Ala. 138, 62 South. 734, to the effect that the Alabama revenue act in question is free from constitutional objection.

Respectfully submitted,

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